Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1441

EDWIN DAVID BANTA and GEORGE HOHMANN,
Petitioners,

v.

FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

JEROME A. DIEKEMPER
JOHN H. GOFFSTEIN
130 South Bemiston Avenue
Clayton, Missouri 63105
(314) 727-0922
Attorneys for Petitioners

Of Counsel
BARTLEY, GOFFSTEIN, BOLLATO & LANGE
130 South Bemiston Avenue
Clayton, Missouri 63105

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioners Edwin David Banta and George Hohmann, Intervenors below, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on November 29, 1978.

Respondents include the Firefighters Institute for Racial Equality, a corporation, and certain individual black employees and applicants for employment in the Fire Department of the City of St. Louis, Missouri (hereinafter collectively referred to as "Private Plaintiffs"); the United States of America, a plaintiff below; and the City of St. Louis, Missouri, a municipal corporation, and certain City officials (hereinafter referred to collectively as "the City").

OPINIONS BELOW

The opinion of the Court of Appeals, unofficially reported at 18 FEP Cases 1083, is reprinted in the Appendix at pp. A1-15. The Order of the Court of Appeals denying Petitioners' Petition for Rehearing and Suggestion for Rehearing In Banc is reprinted in the Appendix at p. A-16.

The unreported Order of the United States District Court for the Eastern District of Missouri dated January 26, 1978, is reprinted in the Appendix at p. A-17 and that the Court's unreported Order of October 21, 1977, is reprinted in the Appendix at p. A-23. Also, included is an order dated December 19, 1978, reprinted in the Appendix at p. A-27.

Previous orders of the District Court and Court of Appeals respectively in this matter are reported at 410 F. Supp. 948 and 549 F.2d 506, *cert. denied*, 434 U.S. 819 (1977).

JURISDICTION

The judgment of the Court of Appeals was entered on November 29, 1978. Petitioners' timely Petition for Rehearing was denied on December 22, 1978. Jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

Did the action of the Court of Appeals in granting an immediate absolute preference in promotions to all black candidates who passed a promotional examination previously held invalid by the Court of Appeals, in the absence of any findings concerning the qualifications of the black candidates relative

to those of non-black candidates, exceed the remedial provisions of Title VII of the Civil Rights Act of 1964, as amended, and/or violate the constitutional rights of the non-black candidates?

In the absence of proof that *but for* the administration of an invalid promotional examination certain black individuals would have been promoted, could the Court of Appeals properly order the promotion of all those blacks who passed the invalid examination, where no non-black candidates had been promoted as a result of the examination?

Where promotions are made exclusively from the ranks of incumbent employees, are the competing rights of all employees to have an equal opportunity for advancement so substantial as to preclude a quota or absolute preference in favor of a class or group of minority employees from ever being "appropriate" either as "affirmative action" or "equitable relief" within the meaning of Section 706(g) of Title VII of the Civil Rights Act of 1964?

Should the Court of Appeals have ordered the immediate promotion of all black employees who passed an invalid promotional examination, where the Court's prior remand order suggested neither the necessity nor the appropriateness of such relief, where the District Court exercised its discretion in not affording such relief, where neither the United States nor Private Plaintiffs sought such relief, and where the Court of Appeals was aware the employer would have a new examination prepared a month after the Court's opinion was rendered?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution, in relevant part provides:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Title VII of the Civil Rights Act of 1964, as amended, in relevant part provides:

§ 706(g) "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, . . . or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the . . . promotion of an individual . . . if such individual was refused . . . advancement . . . for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 704(a)." (42 U.S.C. Sec. 2000e-5(g))

§ 703(j) "Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of race . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community, state, section, or other area or in the available work force in any community, state, section or other area." (42 U.S.C. Sec. 2000e-2(j))

STATEMENT OF THE CASE

In 1974 Private Plaintiffs and the United States filed suit against the City of St. Louis alleging violations of the Constitution, 42 U.S.C. §§ 1981 and 1983, and Title VII of the

Civil Rights Act of 1964, as amended in 1972, to apply to state and local governments, with respect to hiring and promotion and other employment practices in the Fire Department of the City of St. Louis, Missouri. Petitioners Banta and Hohmann intervened on behalf of themselves and a class of 175 other similarly situated whites who had taken and passed the 1974 Fire Captain examination and who were ranked on the Civil Service promotional list.

The District Court found violations of Title VII with regard to City hiring practices but found the promotional examinations sufficiently job-related to be legal, even though the Fire Captain examination had a statistically significant disproportionate impact on blacks. (Blacks, on average, scored approximately seven points lower than whites, with 25.5 percent of the blacks passing and 43.6 percent of the whites passing.)

After the District Court's decision in August 1976, the City of St. Louis notified the parties that it intended to make promotions to the ranks of Fire Captain and Battalion Chief since the District Court had ruled those promotional examinations to be legal. The United States and Private Plaintiffs moved for an injunction pending appeal as to the Fire Captain promotions, which was denied by the District Court but was granted by the Eighth Circuit. The Court of Appeals decision was then filed on February 2, 1977. 549 F.2d 506.

With respect to the Fire Captain examination, the Court of Appeals held that it did not go far enough in testing supervisory skill and ability and therefore was not content valid. 549 F.2d at 511-13. The Eighth Circuit remanded the case to the District Court with directions to retain jurisdiction until a valid examination was devised by the parties and approved by the Court. 549 F.2d at 513-14. No suggestion or hint was given that quota or preferential relief was either considered necessary or even contemplated by the Court of Appeals.

Both the City and Intervenors petitioned for certiorari, which was denied on October 3, 1977. 434 U.S. 819.

The District Court Decision on Remand

On remand, the District Court, without taking any additional evidence, issued an order dated October 21, 1977, which, in large part, adopted an order proposed by the Government, except for the deletion of a provision for a long term "goal". The order enjoined the City from in any way using the 1974 Fire Captain test to make temporary or permanent promotions to the rank of Fire Captain (A-24). The City was ordered to develop a valid examination and told that it *may* make permanent promotions pending development of the test on a 50-50 quota basis (A-24). The City and Petitioners sought alteration or amendment of the October 21, 1977 order. After a December hearing only on the issue of attorneys' fees for counsel for Private Plaintiffs, the Court on January 26, 1978, set aside the October 21 order and entered a new order substituting a procedure based on seniority and an assessment center for the quota in the event the City *chose* to make permanent promotions pending development of a valid test (A-19).

Positions of Parties on Appeal

Only Private Plaintiffs appealed from the January 26, 1978 order, asking that the order of October 21, 1977 be reinstated to require quota relief in the event permanent promotions were made pending development of a valid examination. They also sought quota relief with respect to certain "acting" Fire Captain assignments (not in issue here) and an increase in the attorneys' fees awarded by the District Court.

The Government did not appeal and stated in its brief that, under the circumstances, it did not seek reversal of the January 26 order as an abuse of discretion.

Both the City and Petitioners argued that the District Court had not abused its discretion and, additionally, that none of the Private Plaintiffs had demonstrated that "but for" the administration of the 1974 Fire Captain test they would have been promoted. Petitioners additionally argued that quota promotions would be an unconstitutional and illegal infringement on their rights and would be beyond the scope of remedies permissible under Title VII.

The Court of Appeals Decision

On November 29, 1978, the Court held that the use of a test having a disproportionate impact on blacks was a violation of Title VII for which a remedy must be provided (A-7). Citing *University of California Regents v. Baake*, — U.S. —, 17 FEP Cases 1000, 1015 (1978) the Court stated, "The Supreme Court has recently approved of the use of racial preference as a means for remedying constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference." It cited other cases upholding use of preferential relief in promotions similar to that in this case (A-7). Citing *Teamsters v. U. S.*, 431 U.S. 324 (1977), the Court held that the "but for" argument was without merit (A-8).

With respect to the "abuse of discretion" issue (although not specifically adverted to in those words) the Court, relying on *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and *Teamsters, supra*, stated that the District Court's duty was to fashion "the most complete relief possible" (A-9). The Court found that the use of the 1974 test, coupled with the City's "inaction" in not making promotions[1] justified the use of pref-

[1] It must be noted that the City had not made any permanent promotions since 1973 when its prior promotional list generated in 1971 had expired by operation of law. No one was ever promoted thereafter on the basis of the 1974 Fire Captain examination.

erential relief (A-9-10). While acknowledging in another portion of its opinion that the City would have a new test ready by January 1, 1979 (A-13), the Court held that a preferential remedy was necessary.

> "We cannot ask those black fire fighters who have been the victims of discrimination to wait forever for the vindication of their rights. In light of the City's apparent decision not to make any permanent appointments pending the development of a valid examination, and of the fact that the development of such an examination rests in the first instance with the City, we do not believe that mere reinstatement of the provisions of the District Court's order of October 21, 1977, as requested by F.I.R.E., will afford any greater relief than that afforded by the court's order of January 26, 1978, since under neither order is the City required to make any permanent appointments to fire captain positions. We believe that nothing short of an affirmative order requiring the immediate promotion of those black firefighters who are unquestionably qualified is necessary in order to redress the rights of those who have been the victims of the City's discrimination." (A-10-11)

After an analysis of how relative percentages of the work force would change by the promotion of all 12 black candidates who had passed the 1974 Fire Captain test, the Court ordered that all of them be promoted immediately (A-11). The Court gave the District Court permission to exercise its discretion to promote 12 white candidates (A-12).

The Court finally held that the imposition on the rights of the non-black candidates for promotion was justified under the circumstances.

> "We recognize that the affirmative relief which we order today may impinge upon the justified expectations of both

> black and white firefighters who are as well qualified for promotion as are those twelve black firefighters whose promotion we have ordered. Continued inaction, however, will serve neither to vindicate the rights of those black firefighters who have been the victims of past discrimination nor give the people of St. Louis the fire protection which they deserve." (A-13-14)

Petitioners filed their timely Petition for Rehearing on December 13, 1978. On December 19, 1978, the District Court, prior to any ruling on the Petition for Rehearing, entered an order requiring the immediate promotion of the 12 blacks and 12 whites to the rank of Fire Captain (A-27). The Petition for Rehearing was denied on December 22, 1978, and the promotions ordered on December 19 took place on the morning of December 26, 1978. The mandate of the Court of Appeals did not issue until January 2, 1979. These promotions, if valid, cannot become final under Civil Service rules until the expiration of a six-month probationary period which may be extended for another six months.

REASONS FOR GRANTING THE WRIT

I

The Decision of the Court of Appeals Raises Constantly Recurring Questions of Great Importance and National Concern With Respect to the Appropriateness Under the Constitution and Title VII of the Civil Rights Act of 1964 of Preferential or Quota Relief in Granting Promotions.

To date, this Court has never definitively spoken to the issue of preferential or quota relief in any employment discrimination case. In *University of California Regents v. Baake*, —U.S.—, 17 FEP Cases 1000 (1978), Justice Powell suggested the possible appropriateness of quota relief in employment cases, citing favorably the Eight Circuit's decision in *Carter v. Gallagher*, 452 F.2d 327 (in banc), cert. denied 406 U.S. 950 (1972). However, numerous courts have had and will continue to have problems with determining when, if ever, quota relief should be implemented. Compare, e.g. *Davis v. County of Los Angeles*, 566 F.2d 1334, cert. granted—U.S.—, 46 U.S. Law Week 3780 (1978); *U. S. v. City of Chicago*, 549 F.2d 415 (7th Cir. 1976), cert. denied 434 U.S. 875 (1977); *Carter v. Gallagher*, 452 F.2d 327, (in banc), cert. denied 406 U.S. 950 (1972); and *Morrow v. Crisler*, 479 F.2d 960 (5th Cir. 1973), modified on rehearing in banc, 491 F 2d 1053, cert. denied 419 U.S. 895 (1974) with *Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973); *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973); *Kirkland v. Dept of Correction Services*, 520 F.2d 420 (2nd Cir. 1975), cert. denied 429 U.S. 823; *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216 (5th Cir. 1977), cert. granted —U.S.—, 47 U.S. Law Week 3408 (1978); and *Detroit Police Officers Assn. v. Young*, 446 F. Supp. 979 (E.D. Mich. 1978). This is especially a problem where, like in the instant case, the issue applies to a promotional situation.

The need for guidance to judges, lawyers and litigants in this area is patent. Employees, whether minority or non-minority, are entitled to be advised as to their rights vis-a-vis those of their fellow employees. The uncertain state of the law compels non-minority employees, such as Petitioners here, to intervene in employment discrimination litigation to insure that their interests are adequately represented. Such intervention, of necessity, complicates and lengthens such litigation. Currently, however, there is no other way of protecting the rights of incumbent non-minority employees.

This Court should decide once and for all whether preferential or quota relief is ever appropriate in the context of discrimination in promotions. This decision of necessity would give guidance in the area of hiring discrimination as well. If the Court determines that preferential relief may constitutionally and statutorily be "appropriate", then guidelines, similar to those attempted by the Second Circuit in *Kirkland*, supra, should be given to litigants, their counsel and the Courts so that their efforts can be purposefully directed to the areas of proof necessary to justify such relief.

This Court need look no further than its own experience in seeing the interest and national concern generated by its acceptance of and ruling on the *Baake* case and its acceptance of *Weber* for plenary review, to appreciate the correlative importance of the issues presented here. Regardless of how this Court rules on the issue of voluntary implementation of affirmative action quotas by employers and labor organizations, the question of quota remedies will remain undecided. The instant issues are ripe for decision and their complete resolution should not be left for another day.

II

The Decision of the Court of Appeals Grants an Unconstitutional Remedy and Conflicts With the Letter and Spirit of Decisions of the Supreme Court and Other Courts of Appeals Regarding the Remedial Provisions of Title VII of the Civil Rights Act of 1964.

A

Here, a quota is not a "make whole" remedy.

The actual discrimination found to exist by the Eighth Circuit was the administration of an invalid employment test having a disproportionate impact on blacks. No blacks or whites were ever promoted on the basis of the test. Petitioners submit that there is a qualitative difference in the nature of the violation between the *administration* of an invalid examination and the *implementation* of the results of such an examination. Absent actual illegal promotion of non-minority employees on the basis of an invalid examination, Petitioners contend that a quota promotional remedy can never be "appropriate" within the meaning of Section 706(g) of Title VII (42 U.S.C. § 2000e-5(g)). It must again be noted that the only discrimination found to exist with respect to promotions was the administration of the 1974 Fire Captain examination.

The Supreme Court's primary teachings with respect to remedies in employment discrimination cases are contained in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *Teamsters v. U. S.*, 431 U.S. 324 (1977). The legislative history cited in these cases conclusively establishes that Congress intended that Title VII remedies be fashioned along the lines of remedies afforded discriminatees under the National Labor Relations Act.[2] In each of these cases the Court speaks in

[2] In each of these cases the Court referred to the intent of Congress to parallel remedies available under the National Labor Relations Act. Intervenors are aware of no NLRB case applying quota remedies. Preferential treament under the Labor Act has been limited to preferential reinstatement of unfair labor practice strikers and to preferential rehire of replaced economic strikers who unconditionally apply for reinstatement.

terms of making victims of discrimination whole. *Albemarle*, supra, 422 U.S. at 418-21; *Franks*, supra, 424 U.S. at 769; *Teamsters*, supra, 431 U.S. at . . ., 97 S.Ct. at 1860 and 1869. In *Franks* the Court speaks of "restitution" 424 U.S. at 764 and specifically adopts the "but for" test 424 U.S. at 768 specifically rejected by the Eighth Circuit (A-8). Quoting the Section by Section Analysis of Title VII, the Court in *Franks* holds the remedial purpose of the Act is that "persons aggrieved by the effects and consequences of unlawful employment practices be, so far as possible, restored to where they would have been were it not for the unlawful discrimination." 424 U.S. at 764. Here, however, it would be pure speculation to assert that each of the 12 black candidates ordered to be promoted would have been promoted "but for" the administration of an invalid employment test.

Given the correctness of the Eighth Circuit's prior ruling that the 1974 Fire Captain test was invalid (now the law of this case), the question remains: What were the black candidates for promotion denied by the administration of the invalid test?

The answer is obvious. They were denied the equal opportunity to compete against non-minority candidates.

It is equally obvious, however, that they were not denied promotions they otherwise would certainly have received. It cannot be said that all 12 blacks who passed the invalid examination, would have passed a valid examination and would have scored well enough to have been promoted. The remedy imposed by the Court of Appeals was therefore not "appropriate".[3]

[3] If the quota promotions were "appropriate", should not the 12 blacks also have been accorded the back pay presumptively appropriate under *Albemarle*, supra 422 U.S. at 421, and the retroactive seniority presumptively appropriate under *Franks*, supra, 424 U.S. at 771.

B

Here, a quota is a discriminatory preference without regard to qualification.

The guiding principle of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), is that "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." 401 U.S. at 431. The reasoning of the Court of Appeals to justify the use of quota promotions (A-9-11) appears to be based more on the lack of a reasonable number of black supervisors than on an analysis of whether the individuals ordered to be promoted would have succeeded on a valid test. Additionally, there appears to be no concern for the level of qualifications (other than that they are minimally qualified) of the 12 ordered to be promoted vis-a-vis those of the non-minority candidates for promotion. This is contrary to the Civil Service principles adopted by the City of St. Louis providing for the promotion of the "best qualified" as opposed to the "just barely qualified". It is also contrary to the intentions of Congress:

> "Congress has not commanded that the less-qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications, as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant." (*Griggs*, supra, 401 U.S. at 436).

The fact that there was only one black Fire Captain in the Fire Department did not justify quota relief. See Section 703(j) of Title VII. In *Furnco Construction Co. v. Waters*, — U.S. —, 17 FEP Cases 1061 (1978), this Court stated:

> "It is clear beyond cavil that the obligation imposed by Title VII is to provide an opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." 17 FEP Cases at 1067 (emphasis in original).

Petitioners should have the same opportunity for promotion as the black candidates.

C

Here, granting an absolute preference in promotions to blocks is an unconstitutional infringement on the right of non-black candidates for promotion.

The Judiciary, like the other branches of the Federal Government, is bound by the strictures of the Fifth Amendment. Petitioners submit that the equal protection component of the Fifth Amendment recognized by this Court in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1934), and its progeny, should preclude the granting of an absolute preference in promotional ranks based on race, especially where, as here, promotions are made from the ranks of incumbent employees all competing under a civil service system for advancement. The rights and reasonable expectations of all employees must be respected. Even the Eighth Circuit, in banc, recognized the constitutional implications of an absolute preference in *Carter v. Gallagher*, 452 F.2d 315, when it reversed a district court order granting an absolute preference in hiring. The full court observed:

> "The absolute preference of 20 minority persons who qualify has gone further than any of the reported appellate cases in granting preference to overcome the effects of past discriminatory practices and does appear to violate the constitutional right of Equal Protection of the Law to white persons who are superiorly qualified." 452 F.2d at 328.

Later in its opinion the Court elaborated further:

> "The absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the firefighter's position; and we hesitate to advocate im-

plementation of one constitutional guarantee by the outright denial of another." 452 F.2d at 330.

Petitioners submit that the absolute preference in promotions granted by the Court of Appeals must be struck down. The fact that the District Court subsequently exercised its discretion to appoint an equal number of whites in no way detracts from the precedential effect of the opinion in granting the absolute preference.

D

The Courts of Appeals are split on the appropriateness of mandatory quota relief, especially on the promotional level.

The Eighth Circuit, in the instant case and in *U. S. v. NL Industries*, 479 F.2d 354 (8th Cir. 1973), as well as the Seventh Circuit in *U. S. v. City of Chicago*, 549 F.2d 415 (7th Cir. 1976), cert. denied 434 U.S. 875 (1977), and the Ninth Circuit in *Davis v. County of Los Angeles*, 566 F.2d 1334, cert. granted — U.S. —, 46 U. S. Law Week 3780 (1978), have all granted mandatory quota relief in promotions. The Second Circuit in a line of cases,[4] including *Kirkland v. Dept. of Correction Services*, 520 F.2d 420 (1975), cert. denied 429 U.S. 823, has questioned the propriety of using quotas on the promotional level. In *Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973), the Fourth Circuit affirmed a district court's denial of quota relief. It adopted as its own, the discussion and conclusions of the district court regarding quotas. 486 F.2d at 1136. That district court discussion includes, in part, the following:

[4] *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973); *Rios v. Enterprise Assn. Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974); *Patterson v. Newspaper & Mail Deliverer's Union*, 514 F.2d 767 (2d Cir. 1975); *Kirkland v. Dept. of Correctional Services*, 520 F.2d 420 (2d Cir. 1975); *EEOC v. Sheetmetal Workers Local 638*, 532 F.2d 821 (2d Cir. 1976); *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976).

"Racial quotas in education impose no burden on anyone, since no one has the right to attend a segregated school. On the contrary, all prospective employees have the right to consideration for public employment without regard to race. *As a result of the suspicion with which the law views racial classifications and the fact that the Supreme Court has yet to address the matter, racial employment quotas may not be valid ingredients in relief.* . . . (359 F. Supp. at 1214; emphasis supplied).

"What was said about hiring quotas is at least as applicable to promotion quotas in this case . . . Court ordered promotions would be a windfall to employees who cannot complain that they personally should be higher in the department. That result would also be unfair to those who otherwise could compete equally for the positions." 359 F. Supp. at 1216.

Even the Court of Appeals, in the instant case, was cognizant of the problems inherent in the preferential relief it ordered. "We recognize that the affirmative relief which we order today may impinge upon the justified expectations of both black and white fire fighters who are as well qualified for promotion as are those 12 black fire fighters whose promotion we have ordered." (A-14). The Court, however, ordered the promotions despite this infringement.

E

The Court of Appeals applied an incorrect standard of review.

The Eighth Circuit in its first opinion in this case ordered the parties to devise a valid promotional test to be approved by the District Court. 549 F.2d at 513. The Court of Appeals did not mention or hint at the necessity or even the possibility of ordering quota promotions. Without taking any additional evidence, the District Court, on remand, entered an order re-

quiring quota relief only if the City chose to make permanent promotions pending development of a valid test. On the motion of Intervenors and the City, even this non-mandatory quota was withdrawn by the District Court, in the exercise of its discretion. On appeal, Private Plaintiffs only sought reinstatement of the prior order of October 21, 1977, with its non-mandatory quota. The United States did not appeal and took the position that it did not seek reversal of the District Court order as an abuse of discretion. The Court of Appeals, without the benefit of any new evidence, other than the mere passage of time, substituted its judgment for that of the District Court in ordering an absolute preference for the 12 blacks who passed the invalid examination. This action on the part of the Court of Appeals is contrary to the Supreme Court's teaching in *International Salt Co. v. U. S.*, 332 U.S. 396, 400-01 (1947), that the framing of remedial decrees should take place in the district court, subject to review only if the district court abused its discretion. The same rule was followed by this Court in Title VII cases where the remedy ordered by the district court did not frustrate the purposes of Title VII. See *Albemarle*, supra, 422 U.S. at 416 and 424; *Franks*, supra, 424 U.S. at 770 and 779; *Teamsters*, supra, 431 U.S. at . . ., 97 S.Ct. at 1875. In this case, it is impossible to say that the District Court's order of January 26, 1978 was an abuse of discretion. Thus, the Court of Appeals should not have interfered with the lower court's order.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

JEROME A. DIEKEMPER

JOHN H. GOFFSTEIN
130 South Bemiston Avenue
St. Louis, Missouri 63105
(314) 727-0922
Attorneys for Petitioners

Of Counsel
BARTLEY, GOFFSTEIN, BOLLATO
and LANGE
130 South Bemiston Avenue
St. Louis, Missouri 63105

APPENDIX

APPENDIX I

United States Court of Appeals
For the Eighth Circuit

No. 78-1294

Firefighters Institute for Racial Equality, a Corporation; George Baker, Robert D. Morgan, Robert Grady, Sherman George, George Redford Turner, Lawrence L. Britt, Vernon Ammons, Wendell H. Goins, Charles Gay, George E. Horne, William L. Young, Daniel S. Austin, Robert Anderson, John H. Harvey, Joseph P. Hughes, Eugene Stanton, Preston Sims, Each Individually and on Behalf of All Other Persons, Similarly Situated,
Appellants,

v.

The City of St. Louis, Missouri, a Municipal Corporation; Division of Fire & Fire Prevention, Department of Public Safety, City of St. Louis, Missouri; Frank C. Cummings, in His Capacity as Acting Chairman of the Civil Service Commission of City of St. Louis, Missouri; Fred Gould, in His Capacity as a Member of the Civil Service Commission, City of St. Louis, Missouri; Charles Marino, in His Capacity as Director, Department of Public Safety, City of St. Louis, Missouri; Denis D. Broderick, Individually and in His Capacity as Fire Chief of the City of St. Louis, Missouri; R. Elliott Searce, Individually and in His Capacity as Director of the Department of Personnel, City of St. Louis, Missouri; and United States of America,
Appellees,

and

Joseph Blessing, Michael Davis, Robert Crowley, David Banta, Andrew Rios, George Hohmann, Don Blackwell, Nick Altmeyer and George Tschlis, Each Individually and as Members of a Class,
Intervenors-Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: September 11, 1978
Filed: November 29, 1978

Before HEANEY and STEPHENSON, Circuit Judges, and VAN SICKLE,* District Judge.

HEANEY, Circuit Judge.

This is the latest appeal in protracted litigation, challenging the employment practices of the St. Louis Fire Department. Members of the Firefighters Institute for Racial Equality (F.I.R.E.) and several named plaintiffs brought this action in January, 1974, against the City of St. Louis and various City officials, alleging racial discrimination against blacks in the hiring and promotion of personnel in the St. Louis Fire Department. F.I.R.E. also challenged the existence of racially segregated eating arrangements, or "supper clubs," maintained by white employees in the City's firehouses. The action was brought under 42 U.S.C. §§1981, 1983 and 2000e *et seq.* The United States subsequently filed suit under §2000e *et seq.* as well, charging the City with the "pattern or practice" of discrimination in violation of Title VII of the Civil Rights Act of 1964. The cases were consolidated for trial. The intervenors, representing a class of non-black employees and candidates for employment in the Fire Department, were permitted to intervene on behalf of the City.

On April 9, 1976, the District Court entered an order in which it found for the City on all counts. This order was amended by a nunc pro tunc order issued by the District Court on June 28, 1976. In that order, the court found that the

* BRUCE M. VAN SICKLE, United States District Judge for the District of North Dakota, sitting by designation.

examination which the City had used for the entry level position of firefighter had a disparate racial effect and was not validated.[1] The order required that the City attempt to achieve a fifty percent hiring rate of blacks for firefighter positions over the next five years. F.I.R.E., the named plaintiffs and the United States appealed.[2]

On appeal, this Court affirmed the District Court with regard to the City's use of a particular examination for the position of battalion chief and with regard to the City's refusal to promote a particular individual, George Horne. *Firefighters Institute, Etc. v. City of St. Louis*, 549 F.2d 506, 515-516 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977). We found, however, that the examination administered in 1974 for promotion to the position of fire captain had a racially disparate effect to the disadvantage of minority candidates, and that the City had failed to demonstrate that the test was sufficiently job related to justify its use. *Id.* at 509-513. We remanded the case to the District Court with directions that it maintain continuing jurisdiction until a valid examination is devised by the parties and approved by that court. *Id.* at 513-514. We also found that the maintenance of segregated supper clubs by white employees in the City's firehouses violated Title VII, and directed the District

[1] The mean scores for blacks and whites on the written examination given for the entry level position of firefighter in 1974 were approximately 56.70 and 71.95, respectively. The cut-off score used in 1974 eliminated approximately fifty-one percent of the black applicants and twenty-five percent of the white applicants. The parties stipulated that although the population of St. Louis is approximately forty percent black, only eleven percent of the uniformed personnel employed in the St. Louis Fire Department as of November, 1974, were black.

[2] The United States appealed only that portion of the District Court's order denying relief as to a promotional examination which had been given for the position of fire captain, and as to the maintenance of segregated "supper clubs" by white employees in the City's firehouses. No appeal was taken by any party as to the firefighter examination.

Court, on remand, to supervise the promulgation of regulations by the Fire Department which would prohibit the use of City's facilities for such activities. *Id.* at 515.

On October 21, 1977, the District Court entered an order which permanently enjoined the City from engaging in any practice with respect to promotion to the rank of fire captain which had the purpose or effect of discriminating against any black applicant on the basis of race. The order permanently enjoined the use of the 1974 test results as the basis for either permanent or temporary (acting) appointments to the position of fire captain, except as provided therein. It enjoined the City from making any permanent appointments to the position of fire captain unless made on the basis of a valid examination or, pending the development of a valid examination, unless fifty percent of such vacancies were filled with qualified blacks. The order provided that all black applicants who passed the 1974 test and who were on the 1974 eligibility list were to be deemed qualified during this interim period. In the event that all blacks on that list were offered employment and the defendants desired to make further permanent appointments during this interim period, the parties were directed to determine an appropriate basis for the appointment of black firefighters who are otherwise qualified for promotion under time-in-grade and efficiency rating standards.[3] The order also provided that, to the extent practicable, the fifty percent goal established for permanent appointments during the interim period should also be followed for temporary appointments during this period. The court also directed the City to promulgate regulations to assure that any segregation in communal eating arrangements in firehouses ceased.

[3] Basic qualifications for promotion to the position of fire captain have been five years of experience as a firefighter, satisfactory service ratings and a satisfactory score on the written examination administered in 1974.

On January 26, 1978, the District Court entered an order setting aside its order of October 21, 1977. The court expressed its "deep disappointment with the intransigence of all parties and their continued unwillingness to conscientiously and industriously seek an acceptable procedure for filling the numerous vacancies existing in the position of Fire Captain, which vacancies should be filled if the safety of the persons and properties of St. Louisans is to be assured." The court then reiterated the provisions of its previous order, with the exception of those provisions governing the appointment of individuals to fire captain positions pending the development of a valid examination. Instead of requiring that any such interim appointment to permanent positions be made in accordance with a fifty percent black promotional goal, as specified in the previous order, the revised order provides that such appointments may be made as follows: A racially identified list of all firefighters, who have served five years or more as a firefighter, is to be drawn up in the order of departmental seniority. The black firefighters with the most seniority and the white firefighter with the most seniority will then be offered the opportunity to be evaluated by the Assessment Center technique.[4] The individual receiving the higher evaluation is then to be promoted, regardless of his race. The firefighter who is not promoted remains eligible for the next fire captain vacancy and is evaluated along with the black firefighter and the white firefighter with the next highest seniority. The two unsuccessful candidates for that vacancy remain eligible for the next vacancy, and so on. The order contains no provisions governing temporary appointments to fire captain posi-

[4] The Assessment Center technique, lauded by both F.I.R.E. and the City's expert witnesses, is a selection procedure which uses individual and group exercises to stimulate job responsibilities while assessors evaluate a candidate's performance. *Firefighters Institute, Etc. v. City of St. Louis*, 549 F.2d 506, 513 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977). This Court has previously recognized the potential of the Assessment Center technique as a means for evaluating supervisory skill. *Id.*

tions, except for a general prohibition against the use of the 1974 test result as the basis for any appointments to the position of fire captain, whether on a temporary or permanent basis.

I

F.I.R.E. contends that the remedy contained in the District Court's order of January 26, 1978, is inadequate on several grounds.[5] It contends that the procedure provided in the order for the promotion of individuals to permanent fire captain positions pending the development of a valid examination is inadequate in that it fails to guarantee that any black firefighter will be promoted. It argues that elimination of the effects of past discrimination requires the imposition of a fifty percent black promotional goal, similar to that provided in the District Court's previous order of October 21, 1977. F.I.R.E. also contends that since the firefighters who serve as acting fire captains gain valuable supervisory experience which will give them a competitive advantage on any test for fire captain positions which is developed later, these assignments should also, as far as practicable, reflect a fifty percent black ratio.

The City responds, first, that since the appellants adduced only general statistical information as to the disparate impact of the 1974 examination upon blacks,[6] there is no evidence of racial discrimination which would justify the imposition of a racial goal for promotions to fire captain positions. It contends that no violation of Title VII has been established since there

[5] The United States does not appeal from the District Court's order.

[6] The adverse effect of the 1974 examination on black candidates for fire captain is detailed in our prior opinion. The mean score for blacks was 69.72; for whites, it was 76.59. Of those blacks taking the exam, 25.5 percent received a passing score; 43.6 percent of the whites passed. *Firefighters Institute, Etc. v. City of St. Louis, supra* at 510 n.4.

is no evidence that any firefighters, white or black, have received promotions on the basis of the 1974 examination results, and since there is no evidence that any black firefighters would have been promoted but for the invalid test.

The City's contention that no violation of Title VII has been established which would permit an order requiring that qualified blacks be appointed to acting or permanent fire captain positions is without merit. We have previously held that the promotional examination for fire captain, which was administered by the defendants in 1974, had a racially disproportionate impact on blacks and was not job related. *Firefighters Institute, Etc. v. City of St. Louis, supra* at 509-514. The use of a testing device, although neutral on its face, which has a racially disparate impact on members of minority groups and which has not been properly validated by the employer, constitutes a discriminatory act for which Title VII affords a remedy. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The Supreme Court has recently approved of the use of racial preference as a means for remedying constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. *University of California Regents v. Bakke*, 57 L.Ed.2d 750, 778 (1978). *See also Davis v. County of Los Angeles*, 566 F.2d 1334, 1342-1343 (9th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3780 (June 20, 1978); *Carter v. Gallagher*, 452 F.2d 315, 329-330 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972), and cases cited therein. Other courts have upheld the use of preferential relief in hiring or in the making of promotions after finding that an employer had engaged in a discriminatory testing practice similar to that engaged in here. *See, e.g., United States v. City of Chicago*, 549 F.2d 415, 436-437 (7th Cir.), *cert. denied*, 434 U.S.

875 (1977); *Davis v. County of Los Angeles, supra; Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017, 1026-1028 (5th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Vulcan Soc. of N.Y. City Fire Dept., Inc. v. Civil Serv. Com'n*, 490 F.2d 387, 398-399 (2d Cir. 1973); *Commonwealth of Pennsylvania v. Flaherty*, 404 F.Supp. 1022, 1030-1031 (W.D. Pa. 1975); *Western Addition Community Organization v. Alioto*, 369 F.Supp. 77 (N.D. Cal. 1973), *appeal dismissed as moot*, 514 F.2d 542 (9th Cir.), *cert. denied*, 423 U.S. 1014 (1975).

The City's contention that preferential relief is unavailable because there is no evidence that any specific black candidate for promotion would have been promoted but for the invalid test is likewise without merit. In *Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court stated:

> When the Government seeks individual relief [in a Title VII case] for the vicitims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief. The petitioners' contention in this case is that if the Government has not, in the course of proving a pattern or practice, already brought forth specific evidence that each individual was discriminatorily denied an employment opportunity, it must carry that burden at the second, "remedial" stage of trial. That basic contention was rejected in the *Franks* case [*Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976)]. As was true of the particular facts in *Franks*, and as is typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage of the trial. The employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decision-making.

Id. at 361-362.

The City next contends that even if there has been a violation of Title VII which would make the imposition of preferential relief a possible remedy, the District Court did not err in failing to impose such a remedy in this case.

Title VII has vested broad equitable powers in the federal courts in order "to make possible the 'fashion[ing] [of] the most complete relief possible.' " The federal courts have " 'not merely the power but [also] the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " *Albemarle Paper Co. v. Moody, supra*, at 418, 421. *Accord, Teamsters v. United States, supra*, at 364-365.

We believe that the record in this case, viewed as a whole, provides ample justification for preferential relief such as that imposed by the District Court in its order of October 21, 1977. This litigation was begun in January, 1974, almost five years ago. Since that time, the number of black fire captains in the St. Louis Fire Department has decreased from four to one.[7] Approximately fifty of the 180 permanent fire captain positions in the Fire Department are now vacant. The City has known since October 3, 1977, when its petition for certiorari was denied, that a nondiscriminatory method for the selection of fire captains would have to be devised. Despite this knowledge, little progress has been made in developing such a method.

[7] Of the 180 persons holding the rank of fire captain as of November 30, 1974, a total of four (2.2%) were black. Since that time, one of these black fire captains has been promoted and two have retired, leaving only one black individual now holding the rank of fire captain.

Meanwhile, the City has apparently determined not to make any permanent appointments to fire captain positions,[8] notwithstanding the fact that twelve black firefighters qualified for promotion even on the basis of the discriminatory examination administered in 1974, and that since the filing of this suit, forty-three additional black firefighters have attained the necessary five-year service requirement. The net result of the City's inaction is the continuation of a policy of discrimination against those black candidates for promotion who have been the victims of discrimination in the past. The City's recalcitrance cannot be justified on the basis of operational considerations as the failure of the City to make permanent fire captain appointments has caused a deterioration in the Department's morale and impaired its efficiency.[9]

We cannot ask those black firefighters who have been the victims of discrimination to wait forever for the vindication of their rights. In light of the City's apparent decision not to make any permanent appointments pending the development of a valid examination, and of the fact that the development of

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[8] Intervenors state in their brief that the only reason they did not appeal from the District Court's order of January 26, 1978, was the assurance of the City's administration that under no circumstances would promotions be made pursuant to the District Court's interim plan. The City, in its brief, concedes this intention, stating "[s]ince the promotion procedure suggested by the Court, based upon seniority and the assessment center, was not acceptable [to] any of the parties and because of the fact that no voluntary agreement was reached between the parties, the City is now proceeding with the third alternative * * * and is developing a new promotional exam."

[9] Deputy Fire Chief Allen Brandenmeyer testified that the failure of the City to make appointments to the rank of fire captain has caused deterioration in the morale of the Fire Department, impairing the Department's efficiency in emergency situations. Failure to make promotions has also resulted in a reduction in the number of fire inspections made in commercial and residential areas, and those acting captains who have made such inspections have been handicapped by their lack of apparent authority.

such an examination rests in the first instance with the City, we do not believe that mere reinstatement of the provisions of the District Court's order of October 21, 1977, as requested by F.I.R.E., will afford any greater relief than that afforded by the court's order of January 26, 1978, since under neither order is the City required to make any permanent appointments to fire captain positions. We believe that nothing short of an affirmative order requiring the immediate promotion of those black firefighters who are unquestionably qualified is necessary in order to redress the rights of those who have been the victims of the City's discrimination.[10]

The City concedes that the twelve black firefighters who passed the 1974 examination are qualified for promotion to fire captain positions. These individuals, if otherwise still qualified, should be offered immediate promotion. Since only one individual now holding the rank of fire captain is black, the addition of twelve black fire captains will increase the number of black fire captains to thirteen, or 7.2 percent of all fire captain positions. We do not think that increasing the percentage of blacks holding the rank of fire captain to 7.2 percent is unreasonable, in light of the fact that eleven percent of the uniformed personnel employed by the Fire Department at the time of trial were black, and that this percentage has undoubtedly increased as the fifty percent black hiring goal for the entry level position of firefighter is implemented. *See United States v. N. L. Industries, Inc.*, 479 F.2d

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[10] We note that other courts have approved of the use of interim preferential hiring or promotional relief under similar circumstances. *See, e.g., United States v. City of Chicago*, 549 F.2d 415, 437 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977); *Davis v. County of Los Angeles*, 566 F.2d 1334, 1343-1344 (9th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3780 (June 20, 1978); *Vulcan Soc. of N. Y. City Fire Dept., Inc. v. Civil Serv. Com'n*, 490 F.2d 387, 398-399 (2d Cir. 1973); *Commonwealth of Pennsylvania v. Flaherty*, 404 F.Supp. 1022, 1029 (W.D. Pa. 1975); *Western Addition Community Organization v. Alioto*, 369 F.Supp. 77, 80 (N.D. Cal. 1973), *appeal dismissed as moot*, 514 F.2d 542 (9th Cir.), *cert. denied*, 423 U.S. 1014 (1975).

354, 377 (8th Cir. 1973). In addition to the immediate promotion of the twelve black candidates, the District Court may also, in its discretion, require the immediate promotion of twelve white candidates who are also qualified on the basis of the 1974 examination. Guidelines governing the precise selection of these individuals shall be developed, if necessary, by the District Court.

Any additional promotions which the City desires to make prior to the development of a valid examination must be made in accordance with the Assessment Center technique, as set forth in the District Court's order of January 26, 1978. Written guidelines should delineate the criteria to be used in evaluating a candidate's performance, and those criteria should be objective to the maximum extent possible. *See Wells v. Meyer's Bakery*, 561 F.2d 1268, 1273 (8th Cir. 1977).

It is undisputed that those firefighters who serve as acting fire captains gain valuable supervisory experience which may give them a competitive advantage on any test for fire captain positions which is developed later. We, therefore, agree with the appellants that these assignments must be made in a manner which does not unfairly disadvantage black candidates for promotion. Evidence adduced at a hearing held on August 4, 1976, indicated that assignments to acting fire captain positions were based in part on the results of the 1974 examination, previously invalidated by this Court. The brief of the intervenors informs us that shortly after the issuance of the District Court's order on January 26, 1978, those assigned as acting captains were relieved of that responsibility, and firehouse seniority was instituted as the basis for these positions. The City has confirmed that firehouse seniority is now used. Since this seniority system would inevitably reflect the previous discriminatory practices of the City in the hiring of entry-level personnel, automatic appointment of those firefighters with greatest seniority to acting

fire captain positions serves to perpetuate the effects of past discrimination in violation of Title VII. *See Griggs v. Duke Power Co., supra*, at 430; *United States v. N. L. Industries, Inc., supra*, at 361; *Chavez v. Temple U. High Sch. Dist. No. 218*, 565 F.2d 1087, 1093 (9th Cir. 1977).[11] We, therefore, direct the District Court, on remand, to enter an injunctive decree which requires that assignments to acting fire captain positions reflect a fifty percent black ratio as far as is practicable, pending the development of a valid examination.

The City stated, during oral argument before this Court, that it would have a properly validated examination for the position of fire captain developed by January 1, 1979. We have confidence that the District Court will require the City to keep its commitment in this regard.

Upon the development of such an examination by the City, the court shall promptly hear and resolve any objections which any party has to the plan. If any party objects to that court's determination, that party shall have ten days in which to file notice of appeal in this Court. An accelerated briefing schedule shall then be arranged with the Clerk of this Court.

We recognize that the affirmative relief which we order today may impinge upon the justified expectations of both black and white firefighters who are as well qualified for promotion as are those twelve black firefighters whose promotion we have ordered.

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[11] We are not here concerned with a bona fide seniority system which is immunized from a finding of illegality by reason of §703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h). *See Teamsters v. United States*, 431 U.S. 324, 355-356 (1977). *Compare James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 352-353 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978) (seniority system, which was the product of collective bargaining, must be evaluated in the context of the company's extensive unlawful employment practices during the period of the negotiations and its intransigent adherence to segregationist policies, in determining whether it was in fact bona fide).

Continued inaction, however, will serve neither to vindicate the rights of those black firefighters who have been the victims of past discrimination nor to give the people of St. Louis the fire protection which they deserve. Federally guaranteed rights "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes * * * whether attempted 'ingeniously or ingenuously.'" *Cooper v. Aaron*, 358 U.S. 1, 17 (1958). We are confident that the City's expeditious good faith compliance with our mandate will eliminate the necessity for further imposition of such relief and will allow future promotions to be made on a nondiscriminatory basis which is fair to all candidates.

II

F.I.R.E. next contends that the attorney's fee of $12,500 awarded to F.I.R.E. by the District Court is arbitrary and capricious. It contends that under *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), specific factors must be considered in making an award under § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), and that no consideration of these factors is reflected in the District Court's order.

The guidelines for awarding attorney's fees, which are set forth in *Johnson*, have received repeated approval by this Court. *See Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 884 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977). They should be followed. Moreover, the basis of the award of attorney's fees should be set forth in detail so that this Court can adequately review the record. Failure of the District Court to disclose the basis of its award may compel the conclusion that it has abused its discretion. *See Johnson v. Georgia Highway Express, Inc., supra*, at 720. In this case, we have independently reviewed the record, however, and have determined that the

$12,500 award made by the District Court is adequate compensation in light of the experience of F.I.R.E.'s counsel at the time of trial, the time and labor which we believe should be required for a case of this type, the customary fee for similar legal work in the community, and the other factors listed in *Johnson*. The District Court's denial of the twenty-five percent bonus requested by counsel for F.I.R.E. was also not an abuse of discretion.

We award F.I.R.E. $4,000 for attorney's fees for this appeal.

The order of the District Court is reversed to the extent that it is inconsistent with this opinion. The District Court is hereby directed to modify its decree to grant injunctive relief and to permit further proceedings as required by this opinion.

Reversed and remanded.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX II

United States Court of Appeals
for the Eighth Circuit

No. 78-1294 September Term, 1978

Firefighters Institute for Racial Equality, etc., et al.,
Appellants,
vs.
The City of St. Louis, Missouri, etc., et al.,
Appellees,
and
Joseph Blessing, et al.,
Intervenors-Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for intervenors-appellees and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

December 22, 1978

APPENDIX III

United States District Court
Eastern District of Missouri
Eastern Division

United States of America,
Plaintiff,
vs.
City of St. Louis, et al.,
Defendants.
No. 74-200 C (3).

Firefighters Institute for Racial Equality, et al.,
Plaintiffs,
vs.
The City of St. Louis, Missouri, et al..
Defendants.
No. 74 C 30 (3).

ORDER

(Filed January 26, 1978)

Pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit, and upon motions of the parties, the Court hereby enters the following order in these causes. Prior thereto the Court expresses deep disappointment with the intransigence of all parties and their continued unwillingness to conscientiously and industriously seek an acceptable procedure for filling the numerous vacancies existing in the position of Fire Captain, which vacancies should be filled if the safety of the persons and properties of St. Louisans is to be assured.

IT IS HEREBY ORDERED that the October 21, 1977 order of this Court be and is set aside.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that this Court's nunc pro tunc order of June 28, 1976 is hereby re-entered as of this date and made a part of this order and that all reports and records as are provided for therein shall be accessible to counsel for all parties.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, except as otherwise provided herein, defendants, their officials, agents, employees and all persons acting in concert with them are hereby permanently enjoined from engaging in any act or practice with respect to promotions to the rank of Fire Captain within the St. Louis Fire Department which has the unlawful purpose or effect of discriminating against any black applicant for such position because of race or color.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, except as otherwise provided herein, defendants are permanently enjoined from making permanent or temporary appointments or acting assignments to the position of Fire Captain in any fashion which is in any respect based upon the eligibility list or written test for Fire Captain prepared in 1974.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, except as otherwise provided herein, defendants shall make no appointments to the position of Fire Captain except upon the basis of an examination process shown to be valid in accordance with Title VII of the Civil Rights Act of 1964, as amended, and the guidelines of the Equal Employment Opportunity Commission issued thereunder. If defendants wish to assert the validity of an examination, they shall submit to counsel for all parties at least sixty days prior to any intended use, evidence of the validity of the elements of the process, including a copy of the validation study and all underlying documents or data concerning the development of the selection process and its validity. If the parties are unable to agree upon the validity of the process, the process shall not be utilized unless and until the Court determines, upon motion and such evidentiary hearing as it deems appropriate, that the process has been properly validated. The examination, and copying of any examination process by the parties herein, shall be subject to such protective orders as the Court deems necessary.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that pending development of a valid examination, defendants may, if they so desire, make appointments to the position of Fire Captain by utilizing the following procedure:

a) Within two weeks of this date, defendants shall, with the assistance of the parties herein, prepare a racially-identified list of all firefighters who have served five years or more in the position of firefighter, in the order of the departmental seniority date of each firefighter. The sole purpose of such list shall be to serve as the source for promotions as set forth in this provision. The name of any firefighter eligible to be included thereon shall be removed and not considered if he so directs.

b) The black firefighter with the most departmental seniority and the white firefighter with the most departmental seniority shall then be evaluated by the Assessment Center technique. The firefighter receiving the higher ranking evaluation between the two shall be promoted, regardless of race or comparative seniority. The other firefighter who is not promoted shall then become eligible for the next Fire Captain position to be filled. Also eligible for such position shall be the black firefighter with the next longest departmental seniority and the white firefighter with the

next longest departmental seniority, who shall also both be evaluated by the Assessment Center technique. The firefighter receiving the highest evaluation of the three shall be promoted.

c) The same procedure shall be followed for each vacancy to be filled: with each appointment to a vacancy, the applicant or applicants who had the lower evaluation ratings and had not been appointed to prior vacancies shall be eligible for the next appointment, along with the remaining most senior black firefighter and the remaining most senior white firefighter, who shall likewise be evaluated by the Assessment Center technique. The firefighter receiving the highest ranking evaluation shall be promoted. Again, those firefighters not so promoted shall then become eligible for the next Fire Captain position to be filled. The defendants may fill as many vacancies in the position of Fire Captain as they desire by following the foregoing procedure.

IT IS FURTHER ORDERED that, in any event, pending development of a valid examination, the parties may agree upon any procedure they choose for making permanent or temporary or acting appointments to the position of Fire Captain.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that defendants shall, within thirty days of this date, submit to counsel for all parties appropriate regulations assuring that persons will not be excluded on the basis of race or color from communal eating arrangements within firehouses. Upon agreement by the parties, the Court shall order the implementation of such regulations. If the parties fail to agree, the matter shall be submitted to the Court for resolution.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that defendants shall retain for a period of five years all

records relating to the screening, selection and appointment of persons for the position of Fire Captain, including all applications, identified by race, and all records relating to the selection procedure. Counsel for all parties shall have the right to inspect and copy all such documents upon reasonable notice to defendants without further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that defendants shall submit, together with the reports required in the June 28, 1976 nunc pro tunc order incorporated herein,

a) the name, address, telephone number, date of appointment and race of each person appointed to the position of Fire Captain;

b) the number of persons identified by race who were disqualified for appointment to the position of Fire Captain, classified by the reason for disqualification;

c) the name, address, telephone number and race of each person who failed to complete probation as a Fire Captain;

d) a racially-identified copy of any eligibility list for Fire Captain established during that period:

e) a racially-identified list of persons serving as acting captains during the reporting period, showing hours served for each person in that acting capacity.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that this Court retain jurisdiction of this action for a period of five years for such further relief or other orders as may be necessary or appropriate. At any time after five years from date of entry of this order, defendants may move the Court upon forty-five days' notice to the parties for dissolution of this order and upon their showing that the goals of this order have been achieved, the order may be dissolved.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that plaintiffs shall be awarded costs incurred herein.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that attorney's fees in the amount of $12,250.00 shall be awarded to counsel for plaintiff Firefighters Institute for Racial Equality.

/s/ JOHN F. NANGLE
United States District Judge

Dated: January 26, 1978.

APPENDIX IV

United States District Court, Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, vs. City of St. Louis, et al., Defendants.	No. 74-200 C (3)
Firefighters Institute for Racial Equality, et al., Plaintiffs, vs. The City of St. Louis, Missouri, et al., Defendants.	No. 74 C 30 (3)

ORDER

Pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit, and upon motion of the United States of America,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this Court's nunc pro tunc order of June 28, 1976 is hereby re-entered as of this date and made a part of this order.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that defendants, their officials, agents, employees and all persons acting in concert with them are hereby permanently enjoined from engaging in any act or practice with respect to

promotion to the rank of Fire Captain within the St. Louis Fire Department which has the purpose or effect of discriminating against any black applicant for such position because of race or color.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, except as otherwise provided herein, defendants are permanently enjoined from making permanent appointments and temporary or acting assignments to the position of Fire Captain in any fashion which is in any respect based upon the eligibility list or the written test for Fire Captain prepared in 1974.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, except as otherwise provided herein, defendants shall make no appointments to the position of Fire Captain except upon the basis of an examination process shown to be valid in accordance with Title VII of the Civil Rights Act of 1964, as amended, and the Guidelines issued thereunder. If defendants wish to assert the validity of an examination, they shall submit to plaintiffs' counsel at least sixty days prior to any intended use, evidence of the validity of the elements of the process, including a copy of the validation study and all underlying documents or data concerning the development of the selection process and its validity. If the parties are unable to agree on the validity of the process, the process shall not be utilized unless and until the Court determines, upon motion and such evidentiary hearing as it deems appropriate, that the process has been properly validated.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that pending development of a valid examination process, defendants may make appointments to the position of Fire Captain if at least fifty percent of the vacancies are filled with qualified blacks. All black applicants who were placed upon the eligibility list for Fire Captain prepared in 1974 shall be

deemed qualified during this interim period. If all blacks on that list are appointed and defendants desire to make further appointments during the interim period, the parties shall meet to determine an appropriate basis for determining the order of promotion for other black firefighters qualified for promotion by virtue of the time-in-grade and efficiency rating standards. To the extent practicable, the fifty percent goal established for permanent appointments during the interim period shall be followed for assignments as acting captain during the interim period.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that defendants shall, within thirty days of this, submit to counsel for plaintiffs appropriate regulations assuring that persons will not be excluded on the basis of race or color from communal eating arrangements within firehouses. Upon agreement by the parties, the Court shall order the implementation of such regulations. If the parties fail to agree, the matter shall be submitted to the Court for resolution.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that defendants shall retain for a period of five years all records relating to the screening, selection and appointment of persons for the position of Fire Captain, including all applications, identified by race, and all records relating to the selection procedure. Plaintiffs' attorneys shall have the right to inspect and copy all such documents upon reasonable notice to defendants without further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that defendants shall submit, together with the reports required in the June 28, 1976 nunc pro tunc order incorporated herein,

a) the name, address, telephone number, date of appointment and race of each person appointed to the position of Fire Captain:

b) the number of persons identified by race who were disqualified for appointment to the position of Fire Captain, classified by the reason for disqualification;

c) the name, address, telephone number and race of each person who failed to complete probation as a Fire Captain;

d) a racially-identified copy of any eligibility list for Fire Captain established during that period;

e) a racially-identified list of persons serving as acting captains during the reporting period, showing hours served for each person in that acting capacity.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that this Court retains jurisdiction of this action for a period of five years for such further relief or other orders as may be necessary or appropriate. At any time after five years from date of entry of this order, defendants may move the Court upon forty-five days' notice to plaintiffs for dissolution of this order and upon their showing that the goals of the order have been achieved, the order may be dissolved.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that counsel for plaintiff Firefighters Institute of Racial Equality shall be awarded $6,000.00 in attorney's fees.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that plaintiffs shall be awarded costs incurred herein.

/s/ JOHN F. NANGLE
United States District Judge

Dated: October 21, 1977.

APPENDIX V

United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, vs. City of St. Louis, et al., Defendants.	No. 74-200 C (3)
Firefighters Institute for Racial Equality, et al., vs. City of St. Louis, Missouri, et al., Defendants.	No. 74 C 30 (3)

ORDER

(Filed December 19, 1978)

Pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit, and upon motion of the parties, the Court hereby enters the following order in these causes.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the City of St. Louis shall immediately promote the top or first twelve (12) black firefighters who passed the 1974 examination to the position of fire captain, if otherwise still qualified.

IT IS FURTHER ORDERED. ADJUDGED and DECREED by this Court, in the exercise of its discretion, that the City of St. Louis shall immediately promote the top or first twelve (12)

white firefighters who passed the 1974 examination to the position of fire captain, if otherwise still qualified.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that any additional promotions which the City of St. Louis desires to make prior to the development of a valid examination must be made in accordance with the Assessment Center technique, as previously set forth by this Court in its order of January 26, 1978.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the City of St. Louis, its agents, servants, and employees and all persons acting in concert with them are hereby permanently enjoined from making any assignments to the position of acting fire captain that does unfairly disadvantage black candidates for promotion and further, in order to implement this the City of St. Louis is required to make said assignments reflecting a fifty (50) per cent black ratio, as far as practicable, pending the development of a valid examination.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the City of St. Louis utilize best efforts to develop a properly validated examination for the position of fire captain by January 1, 1979. The Court shall assist in the expedition of resolving any parties' objections to said examination.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that F.I.R.E. be awarded the further sum of Four Thousand Dollars ($4,000.00) for attorney's fee.

/s/ JOHN F. NANGLE
United States District Judge

Dated: December 19, 1978.

FILED
MAY 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

78-
No. 1441

EDWIN DAVID BANTA and GEORGE HOHMANN,
Petitioners,

v.

FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY, et al.,
Respondents.

SUPPLEMENTAL BRIEF

In Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JEROME A. DIEKEMPER
7751 Carondelet Avenue
Clayton, Missouri 63105
(314) 727-0922
Attorney for Petitioners

Of Counsel
DIEKEMPER, HAMMOND and SHINNERS
7751 Carondelet Avenue
Clayton, Missouri 63105

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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v.

FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY, et al.,
Respondents.

SUPPLEMENTAL BRIEF

In Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

This brief is submitted by Petitioners Edwin David Banta and George Hohmann, pursuant to Rule 24 of the Rules of the Supreme Court of the United States, in support of their previously filed Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. Petitioners wish to call the Court's attention to and argue the pertinence of this Court's own decision in the case of *County of Los Angeles v. Davis*, — U.S. —, 47 U.S. Law Week 4317, decided on March 27, 1979, after the filing of the Petition in the instant case.

I

The Court's Holding in *Davis*

In *County of Los Angeles v. Davis*, one of the questions presented was "whether the imposition of minimum hiring quotas for fully qualified minority applicants is an appropriate remedy in this employment discrimination case." 47 U.S. Law Week at 4318. This question arose in a factual situation where the County had proposed to hire applicants for employment in a manner which would have had a disparate impact on blacks. The plan, however, was abandoned when objected to by minority representatives. 47 U.S. Law Week at 4318. No one was actually hired as a result of this plan.

In the opinion for the majority holding the case moot, Mr. Justice Brennan stated:

> "Indeed, it is extremely doubtful, from this record, that the 1972 proposal had any discriminatory effects to redress. The plan, it must be remembered, was never carried out. As a consequence, there has been no finding that any minority job applicant was excluded from employment as a result of the proposal." 47 U.S. Law Week at 4319.

In his dissenting opinion Mr. Justice Stewart concluded in an even stronger statement:

> "It is clear, however, that the only violation remaining in this case, the threatened use of the 1972 test to rank job applicants, cannot justify the extensive remedy ordered by the District Court. 'As with any equity case, the nature of the violation determines the scope of the remedy.' *Swann v. Charlotte-Mecklenburg Bd. of Edu.*, 402 U.S. 1, 16. A simple order enjoining the illegal use of the 1972 test would seem sufficient to remedy the only violation of which respondents had standing to complain." 47 U.S. Law Week at 4320.

Mr. Justice Powell agreed, "I am in agreement with Mr. Justice Stewart that regardless of the proper construction of § 1981 the only arguably illegal conduct in this case could not justify the sweeping remedy ordered by the District Court." 47 U.S. Law Week at 4323 n. 12.

The Pertinence of *Davis* to the Instant Petition

The Petition in this case presents the identical question which the Court was not able to decide in *Davis* because of mootness, with the exception that promotion rather than hiring is at issue here. That the Court recognizes the importance of the issue is patent, since the Court granted certiorari to review it. The fact that all nine Justices seemed to be in agreement that the quota remedy granted in *Davis* was not appropriate, should compel the Court to grant certiorari here and reverse the absolute preference accorded to the minority candidates for promotion by the Eighth Circuit.

While Petitioners fully expect the Government to argue the propriety of the Eighth Circuit's action and the inappropriateness of this case as a vehicle for further illuminating the law of remedies in Title VII cases, the fact remains that the absolute preference in promotions ordered in this case goes far beyond what any other court has sanctioned in a testing situation. To allow the Eighth Circuit's order to stand without any comment would be to grant a roving commission to the Courts of Appeals to ignore the discretion of district court judges in formulating remedies and would provide an open invitation to courts to expand the scope of available "remedies" far beyond any intention ever expressed by Congress.

To paraphrase the majority and minority opinions in *Davis*:

> Indeed, it is extremely doubtful, from this record that the 1974 Fire Captain Promotional Examination had any

discriminatory effects to redress. Promotions based on the test results, it must be remembered, were never carried out. As a consequence, there has been no finding that any minority candidate was excluded from promotion as a result of the test.

And,

It is clear, however, that the only violation remaining in this case, the threatened use of the 1974 test to rank candidates for promotion, cannot justify the extensive remedy ordered by the Court of Appeals. A simple order enjoining the illegal use of the 1974 test would seem sufficient to remedy the only violation of which Plaintiffs had standing to complain.

CONCLUSION

In light of this Court's decision in *County of Los Angeles v. Davis*, and for the reasons previously stated in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

JEROME A. DIEKEMPER
7751 Carondelet Avenue
Suite 600
St. Louis, Missouri 63105
(314) 727-1015
Attorney for Petitioners

Of counsel:

DIEKEMPER, HAMMOND and SHINNERS
7751 Carondelet Avenue
Suite 600
St. Louis, Missouri 63105

Supreme Court, U. S.
FILED
MAY 10 1979
MICHAEL RODAK, JR., CLERK

No. 78-1441

In the Supreme Court of the United States

OCTOBER TERM, 1978

EDWIN DAVID BANTA AND GEORGE HOHMANN,
PETITIONERS

v.

FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

WALTER W. BARNETT
DENNIS J. DIMSEY
Attorneys
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1441

EDWIN DAVID BANTA AND GEORGE HOHMANN,
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v.

FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-15) is not yet officially reported. The order of the district court (Pet. App. A-17 to A-22) is not reported. The previous opinion of the court of appeals is reported at 549 F. 2d 506. The previous opinion of the district court is reported at 410 F. Supp. 948, and its previous order of June 28, 1976 at 418 F. Supp. 383.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1978, and a timely petition for rehearing was denied on December 22, 1978 (Pet. App. A-16). The petition for a writ of certiorari was filed on March 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals' order requiring the promotion of twelve qualified black firefighters to the position of fire captain in the St. Louis Fire Department is an appropriate remedy under Title VII of the Civil Rights Act of 1964.

STATEMENT

1. The United States filed this case on March 18, 1974, pursuant to Sections 706 and 707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5 and 2000e-6, alleging that the City of St. Louis had been and was engaged in a pattern or practice of racial discrimination in the employment of firemen. A pending suit commenced by the Firefighters Institute for Racial Equality, Inc. ("F.I.R.E.") was consolidated with the government's suit. The defendants were the City of St. Louis and various officials with employment responsibilities. Petitioners, representing a group of non-black employees of the Fire Department who held positions on a 1974 eligibility list for promotion to the rank of fire captain, intervened in the consolidated actions.[1]

The district court dismissed both suits. See *United States* v. *City of St. Louis*, 410 F. Supp. 948 (E.D. Mo. 1976). It held that the defendants had established that the promotion examination for the position of fire captain,[2] which disproportionately screened out black candidates, was a reasonable measure of job performance (*id.* at 956, 960).[3] Although it found that the examination for the entry level position of firefighter had a disparate racial effect and had not been validated (*id.* at 953-954), the court did not conclude that this test violated Title VII. The court also held that the exclusion of blacks from "supper clubs" in the firehouses was not the result of any action of the defendants and therefore did not violate Title VII (*id.* at 959.[4]

In response to the United States' motion requesting clarification and amendment of the judgment, the district court entered an order finding the firefighter examination invalid under Title VII and granting injunctive and hiring relief. See *United States* v. *City of St. Louis*, 418 F. Supp. 383 (E.D. Mo. 1976).[5] In all other respects, the court adhered to its original judgment.

The court of appeals reversed in substantial measure, holding that the fire captain promotional examination was invalid and that the City's complicity in the

---

[1]The intervenors also included non-black applicants for employment who held places on a 1974 firefighters eligibility list.

[2]The position of fire captain is the first step above the entry level and the first supervisory position in the Fire Department. A fire captain is responsible for supervising a group of firefighters and equipment and for training persons under his supervision (410 F. Supp. at 951).

[3]From 1962 through 1971, ranking on the eligibility list for fire captain was based in substantial measure upon written tests; the City made no attempt to validate any of these tests or any other standards or requirements used for selecting those to be promoted to the rank of fire captain (410 F. Supp. at 953, 954). After March 24, 1972, when Title VII became applicable to state and local governments, 14 white firefighters and no black firefighters were promoted to fire captain on the basis of the 1971 eligibility list (Govt. Ex. G-19).

[4]Fire Department personnel, who spend a great deal of time living at the firehouse, had formed eating arrangements known as "supper clubs." Food and utensils were purchased jointly, and meals were cooked and eaten together. The City provided the cooking facilities in the firehouses (410 F. Supp. at 955).

[5]No appeal was taken from this aspect of the district court's judgment.

exclusion of blacks from the "supper clubs" was illegal. See *Firefighters Institute for Racial Equality* v. *City of St. Louis*, 549 F. 2d 506 (8th Cir. 1977).[6]

The court held that the 1974 written examination for promotion to the position of fire captain had not been properly validated. The City had conducted a "content validity" study, which involved an analysis of the nature of the fire captains' jobs and an assessment of the extent to which the written test measured the ability of candidates to perform on the job. The court concluded that a "fatal flaw in the validation study" was that "[t]he captain's exam admittedly failed to test the one *major* job attribute that separates a firefighter from a fire captain, that of supervisory ability" (549 F. 2d at 511; emphasis in original). Relying upon the Equal Employment Opportunity Commission's Guidelines on Employee Selection Procedures, the court held that the test could not be sustained because it "failed to test a job component comprising over 40 percent of the employee's time" (*id.* at 512).[7]

The City and the intervenors petitioned for a writ of certiorari, challenging only the court of appeals' ruling invalidating the 1974 fire captain examination. These petitions were denied. See *Banta* v. *United States*, 434 U.S. 819 (1977).

---

[6]The court affirmed the district court's holdings (410 F. Supp. at 953, 955-956, 960) that F.I.R.E. had not established discrimination in the procedures for appointing battalion chiefs and in not promoting George Horne. See 549 F. 2d at 515-516.

[7]The court of appeals also held that the city had a duty under Title VII "to provide a nondiscriminatory working environment" (549 F. 2d at 515), and it therefore directed the district court to supervise the promulgation by the City of regulations providing that the "use of city facilities by supper clubs may not continue in a discriminatory and segregated manner" (*ibid.*).

2. On October 21, 1977, the district court entered an order prohibiting the City from using the 1974 test results as a basis for permanent or temporary appointments to the rank of fire captain (Pet. App. A-23). The order required that all appointments to the rank of fire captain be made on the basis of a valid examination, and permitted the City, pending development of such an examination, to appoint fire captains if at least 50 percent of the vacancies were filled with qualified blacks (*id.* at A-24). The order specified that all black applicants who had passed the 1974 fire captain examination and who were on the 1974 eligibility list were to be deemed qualified during the interim period (*id.* at A-24 to A-25). If the City wanted to make additional interim appointments, the parties were to determine a proper method for promoting other qualified black firefighters based upon the criteria of time-in-grade and efficiency ratings (*id.* at A-25). The order also instructed the City to issue regulations assuring the termination of any segregation in communal eating arrangements within firehouses (*id.* at A-25).

On January 26, 1978, the district court issued an order modifying its order of October 21, 1977 (Pet. App. A-17. This order arogated the provisions of the October 21, 1977, order requiring that blacks constitute at least 50 percent of those firefighters appointed to the rank of fire captain pending development of a valid test. Instead, the order authorized the City to make such interim appointments on the basis of departmental seniority and the

"Assessment Center technique" (*id.* at A-19 to A-20).[8] Alternatively, the order provided that, "pending development of a valid examination, the parties may agree upon any procedure they choose for making permanent or temporary or acting appointments to the position of Fire Captain" (*id.* at A-20). In all other respects, the January 26, 1978, order reiterated the provisions of the order of October 21, 1977.

3. Private plaintiffs appealed from the January 26, 1978, order claiming that the procedure in that order for promoting persons to fire captain positions pending development of a valid examination was inadequate because it failed to guarantee that any black firefighter would be promoted. The court of appeals found that the City's failure to make any permanent fire captain appointments since January 1974 discriminated against black candidates for promotion to that rank (Pet. App. A-9 to A-10). The court further held that "mere reinstatement of the provisions of the District Court's order of October 21, 1977, as requested by F.I.R.E., will [not] afford any greater relief than that afforded by the court's order of January 26, 1978, since under

[8]The Assessment Center technique is "a selection procedure which uses individual and group exercise to stimulate job responsibilities while assessors evaluate a candidate's performance" (Pet. App. A-5 n.4). The selection procedure established by the January 26, 1978, order is as follows. The City is to prepare a "racially-identified list of all firefighters who have served five years or more in the position of firefighter, in the order of the departmental seniority date of each firefighter" (*id.* at A-19). The black and white firefighters with the most departmental seniority are then to be evaluated by the Assessment Center technique; the individual receiving the higher score is to be promoted, regardless of race or comparative seniority (*ibid.*). The individual who is not promoted becomes eligible for the next fire captain vacancy, and is to be evaluated along with the black and white firefighters with the next highest seniority. The two unsuccessful candidates for that vacancy become eligible for the next vacancy, and so on (*id.* at A-19 to A-20).

neither order is the City required to make any permanent appointments to fire captain positions" (*id.* at A-11). It stated that "nothing short of an affirmative order requiring the immediate promotion of those black firefighters who are unquestionably qualified is necessary in order to redress the rights of those who have been the victims of the City's discrimination" (*ibid.*; footnote omitted). Accordingly, the court ordered the twelve black firefighters who had passed the 1974 examination—who the City conceded were qualified—to be promoted immediately to the rank of fire captain (*ibid.*). The court permitted the district court, in its discretion, to order the immediate promotion of 12 white firefighters who qualified for promotion on the basis of the 1974 examination (Pet. App. A-12).[9]

On December 19, 1978, the district court ordered the promotion of the 12 black firefighters, as well as 12 white firefighters, to the rank of captain (Pet. App. A-27 to A-28). These promotions took place on December 26, 1978. Under civil service regulations the promotions become final after a six-month probation period, which may be extended for an additional six months (Pet. 9).

[9]The court also required any additional permanent promotions to the rank of fire captain to be made in accordance with the Assessment Center technique (*ibid.*). It also provided that assignments to acting fire captain positions, pending development of a valid examination, were to "reflect a fifty percent black ratio as far as is practicable" (*id.* at A-13). Finally, the court affirmed a $12,500 attorney's fees award to F.I.R.E. and awarded F.I.R.E. an additional $4000 in attorney's fees for the appeal (*id.* at A-14 to A-15).

Only the intervenors have petitioned this Court for a writ of certiorari. Their petition challenges the court of appeals' decision only insofar as it ordered the immediate promotion of 12 black firefighters to the rank of fire captain.

ARGUMENT

1. Petitioners contend that the only discrimination found by the court of appeals with respect to promotions was the administration of the 1974 fire captain examination. Drawing a distinction between the *administration* of an invalid examination and the *implementation* of the results of such an examination, they contend that "[a]bsent actual illegal promotion of non-minority employees on the basis of an invalid examination, * * * a quota promotional remedy can never be 'appropriate' [equitable relief] within the meaning of Section 706(g) of Title VII * * *" (Pet. 12).[10]

Petitioners' argument rests upon a faulty premise. For, in addition to finding the administration of the 1974 examination discriminatory, the court of appeals also found discrimination in the City's failure to make any permanent fire captain appointments for almost five years following the commencement of this litigation in January 1974. The court of appeals held that "[t]he net result of the City's inaction is the continuation of a policy of discrimination against those black candidates for promotion who have been the

[10]Although the results of the 1974 examination were not used as a basis for permanent promotions to the rank of fire captain, assignments to acting fire captain positions were based in part on the results of this examination (Pet. App. A-12). "It is undisputed that those firefighters who serve as acting fire captains gain valuable supervisory experience which may give them a competitive advantage on any test for fire captain positions which is developed later" (*ibid.*).

victims of discrimination in the past" (Pet. App. A-10). The court correctly ruled that Title VII prohibits an employer from refusing to make any promotions where, as here, such refusal serves to perpetuate the effects of past discrimination. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). This discriminatory refusal by the City to make any permanent fire captain appointments justified the imposition of appropriate equitable relief under Title VII.

2. As this Court has consistently recognized, a federal court has not only the power, but also the duty, to render a decree in cases of racial discrimination that will as far as possible eliminate the effects of past discrimination, as well as bar like discrimination in the future. *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770 (1976); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 364 (1977). The court of appeals in the instant case framed a limited decree designed to remedy the effects of past discrimination. That decree required the City to appoint only 12 black firefighters to the position of fire captain. All of these firefighters had passed the 1974 examination administered by the fire department, and all were conceded by the City to be qualified to perform a fire captain's duties (Pet. App. A-11). At the time the court issued its order in November 1978, approximately 50 of the 180 fire captain positions were vacant, and only one black held the rank of fire captain (*id.* at A-9). The City had failed to make any promotions to that rank since 1974, and that failure had adversely affected both the morale and the efficiency of the department (*id.* at A-10 &

n.9). Moreover, the remedial orders entered by the district court had failed to require the promotion of any black firefighters pending development of a properly validated examination (*id.* at A-11), and the City had determined not to promote any firefighters during this interim period (*id.* at A-10 & n.8) and had made little progress in developing a valid test since this Court's previous denial of certiorari in this case on October 3, 1977 (*id.* at A-9). In these circumstances, the court of appeals correctly concluded that "[c]ontinued inaction * * * will serve neither to vindicate the rights of those black firefighters who have been the victims of past discrimination nor to give the people of St. Louis the fire protection which they deserve" (*id.* at A-14).

3. It is clear that numerical relief such as that mandated by the court of appeals may be imposed in an appropriate case. The 1972 Amendments of Title VII, which apply here, added to Section 706(g), 42 U.S.C. 2000e-5(g), authority to award "any other equitable relief as the court deems appropriate." That language must be read against congressional rejection of proposed amendments that would have barred numerical relief (118 Cong. Rec. 1676, 4918 (1972)) and the express approval of two decisions authorizing such relief by Senators Javits and Williams, the principal spokesmen against the limiting proposals (*id.* at 1662-1676, 4917-4918). See *United States* v. *Intern. Union of Elevator Constructors*, 538 F. 2d 1012, 1019-1020 (3d Cir. 1976).

4. Contrary to petitioners' assertion (Pet. 16-17), the courts of appeals are not divided on the appropriateness of using numerical relief in shaping a remedy for past discrimination. Appropriately tailored numerical relief

has been upheld in all eight circuits that have considered the matter, where such relief is necessary to rectify the effects of past exclusionary practices.[11] *Harper* v. *Kloster*, 486 F. 2d 1134 (4th Cir. 1973), relied upon by petitioners as creating a conflict among the circuits on this issue, held only that the district court's refusal to impose the requested relief, on the facts of that case, was not an abuse of discretion. And in *Kirkland* v. *New York State Department of Correctional Services*, 520 F. 2d 420, 428 (2d Cir. 1975), cert. denied, 429 U.S. 823 (1976), the court held that goals were not warranted because of "the paucity of the proof concerning past discrimination." Accord, *Sledge* v. *J. P. Stevens & Co.*, 585 F. 2d 625 (4th Cir. 1978). The Second Circuit has approved the imposition of goals in appropriate circumstances both before and after *Kirkland*. See note 11, *supra*.

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[11]See, *e.g.*, *Morgan* v. *Kerrigan*, 509 F. 2d 599 (1st Cir. 1975); *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 504 F. 2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); *Patterson* v. *Newspaper and Mail Deliverers' Union*, 514 F. 2d 767 (2d Cir. 1975); *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 501 F. 2d 622 (2d Cir. 1974); *Equal Employment Opportunity Commission* v. *American Telephone & Telegraph Co.*, 556 F. 2d 167 (3d Cir. 1977), cert. denied, Nos. 77-241, 77-242 and 77-243 (July 3, 1978); *NAACP* v. *Allen*, 493 F. 2d 614 (5th Cir. 1974); *Morrow* v. *Crisler*, 491 F. 2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974); *United States* v. *Local 212, Electrical Workers*, 472 F. 2d 634 (6th Cir. 1973); *United States* v. *Masonry Contractors Ass'n*, 497 F. 2d 871 (6th Cir. 1974); *United States* v. *City of Chicago*, 549 F. 2d 415 (7th Cir.), cert. denied, 434 U.S. 875 (1977); *Crockett* v. *Green*, 534 F. 2d 715 (7th Cir. 1976); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 377 (8th Cir. 1973); *Carter* v. *Gallagher*, 452 F. 2d 315, 331 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972); *United States* v. *Ironworkers Local 86*, 443 F. 2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

The imposition of limited numerical requirements in the context of the particular factual circumstances present here was well within the court of appeals' authority and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

WALTER W. BARNETT
DENNIS J. DIMSEY
Attorneys

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